IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 195 of 2007
In
COMPANY PETITION No. 36 of 2006
With
COMPANY APPLICATION No. 196 of 2007
In
COMPANY PETITION No. 36 of 2006
With
COMPANY APPLICATION No. 197 of 2007
In
COMPANY PETITION No. 36 of 2006

For Approval and Signature:
HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KISHORDAS SHAMJIBHAI MEHTA - Applicant(s)
Versus
O.L. OF CHOKSI TUBE COMPANY LTD. - Respondent(s)

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Appearance :
MS HINA DESAI for Applicant(s) : 1,
OFFICIAL LIQUIDATOR for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 30/04/2007

COMMON ORAL JUDGMENT

1. Present Judge's Summons have been taken out by the respective applicants for an appropriate order granting leave to proceed against M/s. Choksi Tube Company Limited for continuing of the proceedings before the learned Additional Chief Metropolitan Magistrate, 23rd Court at Esplanade at Bombay in respective criminal cases for the offence under Section 138 of the Negotiable Instrument Act; 1881 (hereinafter referred to as “the N.I.Act” for short).

2. It is the case on behalf of the respective applicants that they have filed criminal complaints against the said company and their Directors for the offence under Section 138 of the N.I.Act. It is submitted that as after filing of the respective criminal complaints, M/s. Choksi Tube Company Limited is ordered to be wound up by order dated 11.9.2006, present Judge's Summons have been taken out for an appropriate permission as required under Section 446 of the Companies Act; 1956.

3. At the outset, it is required to be noted that in none of the application copy of the criminal complaint has been annexed. It is also required to be noted that in the respective applications there are no averments as to when the respective criminal complaints are filed and for what offence, however, the learned counsel appearing for the applicants has orally submitted that those criminal complaints are for the offence under Section 138 of the N.I.Act. Now, in light of the fact that the respective criminal complaints are filed against the company and its Managing Directors and Directors, who have signed the respective cheques, under Section 138 of the N.I.Act, these applications are required to be decided.

4. As stated above, all these applications are for leave of the Court to proceed further with the aforesaid criminal complaints filed for the offence punishable under Section 138 of the N.I.Act. Section 446(1) of the Companies Act,

1956 runs as follows :-

"(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of winding up order, shall be proceeded with, against the company, except by leave of the [Tribunal] and subject to such terms as the [Tribunal] may impose."

Identical question came to be considered by the Andhra Pradesh High Court in case of ***Nagarjuna Finance Limited V/s. Kanosika Laboratories Limited (in liquidation) and another*** reported in **(1998) 94 Company Cases 127.** While the Keralla High Court in case of ***Jose Antony Kokkad V/s. Official Liquidator And Another*** reported in **(1999) 98 Company Cases 275;** affirmed by the Division Bench of the Keralla High Court reported in **(2000) 100 Company Cases 811** and considering the expression "other legal proceedings" in Section 446 of the Companies Act, 1956, it is held that for prosecuting pending criminal cases under Section 138 of the N.I.Act, 1881 against a company, no leave is

required to be obtained from the Company Court under Section 446 of the Companies Act; 1956.

The prosecution on a Director and the company under Section 138 of the N.I.Act; 1881 is not a proceeding against the assets of the company and therefore, leave of the Court under Section 446 is not necessary. It is also required to be noted that no recovery of any amount covered by the dishonoured cheques is envisaged in a criminal case and, therefore, it is purely a personal act and does not fall under the purview of Section 446 of the Companies Act, 1956.

5. Considering the above decisions of the Andhra Pradesh High Court as well as Keralla High court, this Court is also of the opinion that for prosecuting criminal complaint under Section 138 of the N.I.Act, leave of the Court under Section 446 of the Companies Act, 1956 is not required.

6. For the reasons stated above, all the applications are hereby dismissed as stated above. No leave of the Court under Section 446 of the Companies Act, 1956 for proceeding further with the criminal complaints under Section 138 of the Negotiable Instrument Act; 1881 is required.

[M.R.Shah, J.]

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